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17 (See next page for listing of additional counsel)

18 IN THE UNITED STATES DISTRICT COURT  
19 FOR THE DISTRICT OF ARIZONA

20 UNITED STATES OF AMERICA )

21 and )

22 STATE OF ARIZONA, ex rel. )  
STEPHEN A. OWENS, Director, )  
23 Arizona Department of Environmental Quality, )

24 Plaintiffs, )

25 v. )

26 PHELPS DODGE SIERRITA, INC. )  
(formerly known as Cyprus )  
27 Sierrita Corporation), )

28 Defendant. )

CIVIL ACTION NO.

CONSENT DECREE

1 )  
2 NEWMAN R. PORTER  
3 (State Bar No. 1421)  
4 AMY R. PORTER  
5 (State Bar No. 4182)  
6 Lewis and Roca LLP  
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8 Phoenix, Arizona 85004-4429  
9 Telephone: (602) 262-5786  
10  
11 Attorneys for Defendant  
12

13 WHEREAS, concurrent with the Lodging of this Consent Decree, Plaintiff United States  
14 of America, by authority of the Attorney General and at the request of the Administrator of the  
15 United States Environmental Protection Agency, and Plaintiff State of Arizona, by its Attorney  
16 General and at the request of the Arizona Department of Environmental Quality, are filing a  
17 Complaint against Defendant Phelps Dodge Sierrita, Inc., alleging violations of the Clean Air  
18 Act, 42 U.S.C. §§ 7401-7671q, and Arizona Revised Statutes, Title 49, Chapter 3, at Phelps  
19 Dodge Sierrita's open-pit mining, mineral concentration, and molybdenum refining facility  
20 located near Green Valley in Pima County, Arizona;

21 WHEREAS, Phelps Dodge Sierrita, Inc., without filing any answer in this action, neither  
22 admits nor denies the violations alleged in the Complaint;

23 WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds,  
24 that this Consent Decree has been negotiated by the Parties in good faith and that this Consent  
25 Decree is fair, reasonable, and in the public interest;

26 NOW, THEREFORE, before taking any testimony, without the adjudication of any issue  
27 of fact or law, and upon the consent and agreement of the Parties to this Consent Decree, it is  
28 hereby ORDERED, ADJUDGED, AND DECREED as follows:

29 I. JURISDICTION AND VENUE

30 1. This Court has jurisdiction over the subject matter of and the Parties to this action  
31 under Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1331, 1345,  
32 and 1355. In addition, this Court has subject matter jurisdiction over the claims of the State

1 under 28 U.S.C. § 1367(a) and principles of supplemental jurisdiction because the State's claims  
2 pursuant to A.R.S. § 49-463 are so related to the United States' claims that they form part of the  
3 same case or controversy.

4 2. Venue is proper in this judicial district under Section 113(b) of the Clean Air Act,  
5 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1391 and 1395, because it is the judicial district in which  
6 the Defendant resides and in which the violations alleged in the Complaint are alleged to have  
7 occurred and to be occurring.

8 3. Pursuant to Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b), notice of  
9 the commencement of this action was given to the Arizona Department of Environmental  
10 Quality.

11 4. Phelps Dodge Sierrita, Inc., waives any and all objections and defenses that it may  
12 have to the jurisdiction of this Court and the venue in this judicial district.

## 13 II. DEFINITIONS

14 5. Unless otherwise expressly provided herein, terms used in this Consent Decree  
15 shall have the meaning assigned to those terms in the Clean Air Act, 42 U.S.C. §§ 7401-7671q,  
16 and the federal and state rules and regulations promulgated thereunder. Whenever terms listed  
17 below are used in this Consent Decree or any attachments or documents incorporated by  
18 reference hereto, the following definitions shall apply:

19 a. "A.A.C." shall mean the Arizona Administrative Code.

20 b. "Act" shall mean the Clean Air Act, as amended, 42 U.S.C. §§ 7401-  
21 7671q.

22 c. "ADEQ" shall mean the Arizona Department of Environmental Quality  
23 and any successor departments or agencies of the State.

24 d. "Air Impact Analysis" shall mean the "Modeling Protocol for Phelps  
25 Dodge Sierrita, Inc.'s Primary Crushing Unit PM<sub>10</sub> Air Quality Analysis" attached to this  
26 Consent Decree as Appendix 2.

27 e. "A.R.S." shall mean the Arizona Revised Statutes.

1 f. "BACT" shall mean the "Best Available Control Technology," as that  
2 term is defined in SIP rule R9-3-101.

3 g. "CEMS" shall mean a continuous emissions monitoring system referred to  
4 in SIP rule R9-3-521(C)(2) for measuring sulfur dioxide emissions, and which is installed,  
5 calibrated, maintained, and operated in accordance with the provisions of Appendix 3 of this  
6 Consent Decree. The term includes the total equipment used to sample and condition, to analyze,  
7 and to provide a permanent record of emissions. For the purpose of Paragraph 12 of this Consent  
8 Decree only, the term "CEMS" shall also include the procedures in Section II.A of Appendix 3 of  
9 this Consent Decree (i.e., roaster feed weighing, sampling, analyzing, monitoring, recording, and  
10 reporting systems; and the SO<sub>2</sub> Generation Determination and SO<sub>2</sub> Mass Emissions  
11 Determination procedures).

12 h. "C.F.R." shall mean the Code of Federal Regulations.

13 i. "Consent Decree" or "Decree" shall mean this Consent Decree and all  
14 attachments and documents incorporated by reference hereto. In the event of conflict between  
15 this Consent Decree and any attachment or document incorporated by reference, the Consent  
16 Decree controls.

17 j. "Day" shall mean a calendar day. In computing any period of time under  
18 this Consent Decree, where the last day of such period would fall on a Saturday, Sunday, or  
19 Federal or State holiday, the period shall run until the close of business on the next day that is not  
20 a Saturday, Sunday, or Federal or State holiday.

21 k. "Dispute Resolution" shall mean the dispute resolutions procedures set  
22 forth in Section IX of this Consent Decree. For purposes of this Consent Decree only, such  
23 procedures shall be deemed "civil or administrative enforcement proceeding[s]" as that term is  
24 used in Attachment A, Section XII of the Existing Title V Permit.

25 l. "Dual Primary Crusher" shall mean the Mark II primary crusher  
26 constructed at the Facility in 1996 (also known as "Primary Crusher 6A") and the Allis-Chalmers  
27 primary crusher reconstructed at the Facility in 1996 (formerly known as "Duval Portable

Crusher” and presently also known as “Primary Crusher 6B”).

m. “Eastern NSPS Affected Facilities” shall mean the following apparatus located at the Facility’s Sierrita Fine Crushing Plant: four Allis-Chalmers secondary crushers, four Allis-Chalmers secondary crushing finishing screens, nine Allis-Chalmers tertiary crushers, and the conveyor belt transfer points associated with the intermediate fine crushing conveyor no. 7A (except for the conveyor belt transfer point from conveyor no. 7A to fine crushing bin no. 7A). Six Ducon wet scrubbers (nos. 1-5, and 7) are associated with the Eastern NSPS Affected Facilities. The Eastern NSPS Affected Facilities and their associated wet scrubbers are highlighted in the diagram attached to this Consent Decree as Appendix 1.

n. “Entry” or “Date of Entry” shall mean the date on which this Consent Decree is entered as an order by the United States District Court.

o. “EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

p. “Existing Title V Permit” shall mean ADEQ Permit Number M190699P2-99 issued by ADEQ to Phelps Dodge on June 24, 2002, in accordance with Title V of the Act and A.R.S. Title 49, Chapter 3, and attached to this Consent Decree as Appendix 4.

q. “Facility” shall mean Phelps Dodge’s open-pit mining, mineral concentration, and molybdenum refining facility located near Green Valley in Pima County, Arizona.

r. “Final Revised Permit” shall mean the Existing Title V Permit that has been revised/modified to meet the requirements of this Consent Decree, that has completed all permit revision/modification procedures required by 40 C.F.R. Parts 70 or 71, whichever is applicable, and that is no longer subject to any judicial review procedures.

s. “Lodging” or “Date of Lodging” shall mean the date on which the Plaintiffs lodge this Consent Decree with the United States District Court for the purpose of seeking public comment on the Consent Decree.

t. “NSPS Affected Facilities” shall mean both the Eastern NSPS Affected

1 Facilities and the Western NSPS Affected Facilities. The NSPS Affected Facilities and their  
2 associated wet scrubbers are highlighted in the diagram attached to this Consent Decree as  
3 Appendix 1.

4 u. "Paragraph" shall mean a portion of this Consent Decree identified by an  
5 Arabic numeral or an upper or lower case letter. Any reference to a paragraph designated by an  
6 Arabic numeral includes all subsequent paragraphs designated by consecutive lower case letters.

7 v. "Parties" shall mean the United States, the State, and Phelps Dodge.

8 w. "Phelps Dodge" or "Defendant" shall mean Phelps Dodge Sierrita, Inc.,  
9 and its successors or assigns.

10 x. "Plaintiffs" shall mean the United States and the State.

11 y. "PSD Permit" shall mean an installation/construction permit issued in  
12 accordance with 40 C.F.R. § 52.21 and SIP rules R9-3-301, R9-3-304, and R9-3-305. Such  
13 permit may be processed as a significant permit revision/modification pursuant to A.A.C. R18-2-  
14 320 or 40 C.F.R. Part 71, whichever is applicable, provided that the substantive requirements of  
15 40 C.F.R. § 52.21 and SIP rules R9-3-301, R9-3-304, and R9-3-305 (e.g., apply BACT, perform  
16 Air Impact Analysis) are satisfied in processing the Final Revised Permit.

17 z. "Section" shall mean a portion of this Consent Decree identified by an  
18 upper-case roman numeral.

19 aa. "SIP" shall mean "The State of Arizona Air Pollution Control  
20 Implementation Plan," as approved by the EPA Administrator pursuant to Section 110 of the Act,  
21 42 U.S.C. § 7410. This term includes all EPA-approved revisions to the SIP as specified at 40  
22 C.F.R. § 52.120(c).

23 bb. "State" shall mean the State of Arizona, including all of its departments,  
24 agencies, and instrumentalities.

25 cc. "United States" shall mean the United States of America, including all of  
26 its departments, agencies, and instrumentalities.

27 dd. "Western NSPS Affected Facilities" shall mean the following apparatus

1 located at the Facility's Sierrita Fine Crushing Plant: fine crushing bin no. 7A, intermediate fine  
2 crushing screens nos. 1 and 3, the conveyor belt transfer points associated with the belt feed  
3 conveyors nos. 7A1 and 7A3, and the conveyor belt transfer point from conveyor no. 7A to fine  
4 crushing bin no. 7A. One Ducon wet scrubber (no. 8) is associated with the Western NSPS  
5 Affected Facilities. The Western NSPS Affected Facilities and their associated wet scrubbers are  
6 highlighted in the diagram attached to this Consent Decree as Appendix 1.

### 7 III. OBJECTIVES

8 6. It is the express purpose of the Parties entering into this Consent Decree to further  
9 the objectives of the Act and to resolve the violations that the United States and the State  
10 specifically alleged in the Complaint filed in this action. To further these objectives, Phelps  
11 Dodge agrees, inter alia, to comply with the measures as set forth in Section V (Compliance  
12 Measures) and to pay the civil penalties as set forth in Section VI (Civil Penalties).

### 13 IV. BINDING EFFECT

14 7. The provisions of this Consent Decree shall apply to and be binding upon the  
15 United States, the State, and Phelps Dodge. Phelps Dodge shall be responsible for the acts or  
16 omissions of any of its respective officers, directors, agents, trustees, servants, employees,  
17 successors, assigns, consultants, and all persons, firms, and corporations acting under the control  
18 or direction of Phelps Dodge, which violate or cause Phelps Dodge to violate the terms of this  
19 Consent Decree.

20 8. No change in ownership or corporate or other legal status of Phelps Dodge nor  
21 any transfer of Phelps Dodge's assets or liabilities shall in any way alter the responsibilities of  
22 Phelps Dodge under this Consent Decree. Phelps Dodge shall give notice of this Consent Decree  
23 to any successors in interest prior to transfer of any ownership interest in the Facility. At least  
24 fifteen (15) days prior to such transfer, Phelps Dodge shall provide both the United States  
25 Department of Justice and the State's Attorney General with a copy of the notice, at the addresses  
26 listed in Section XI of this Consent Decree.

27 9. Notwithstanding any retention of contractors or agents to perform any work

1 required under this Consent Decree, Phelps Dodge is responsible for ensuring that all work is  
2 performed in accordance with the terms of this Consent Decree. In any action to enforce this  
3 Decree, Phelps Dodge shall not assert as a defense the failure of its employees, servants, agents,  
4 or contractors to take any action necessary to comply with this Consent Decree, unless Phelps  
5 Dodge establishes that such failure resulted from a "force majeure" event as defined in Section  
6 VIII (Force Majeure).

7 10. Each undersigned representative of Phelps Dodge, ADEQ, and the Environment  
8 and Natural Resource Division of the United States Department of Justice certifies that he or she  
9 is fully authorized to enter into the terms and conditions of this Consent Decree, and to execute  
10 and legally bind the Party he or she represents to this Consent Decree.

#### 11 V. COMPLIANCE MEASURES

12 11. Eastern NSPS Affected Facilities. Upon Entry of this Consent Decree, Phelps  
13 Dodge shall comply with all of the requirements of 40 C.F.R. Part 60, Subparts A and LL  
14 applicable to the Eastern NSPS Affected Facilities; such applicable requirements including, but  
15 not being limited to, the following requirements:

16 a. Particulate Matter Standard. Limiting the discharge into the atmosphere of  
17 stack and process fugitive emissions from the Eastern NSPS Affected Facilities in accordance  
18 with the particulate matter and opacity standards of 40 C.F.R. § 60.382.

19 b. Monitoring, Recordkeeping, and Reporting. Installing, calibrating,  
20 maintaining, and operating continuous monitoring devices on the wet scrubbers associated with  
21 the Eastern NSPS Affected Facilities; recording, at least weekly, the measurements from these  
22 devices; and submitting semiannual reports regarding such measurements as required by 40  
23 C.F.R. §§ 60.384 and 60.385.

24 12. Molybdenum Roasting Operations.

25 a. Reduced Sulfur, Opacity, and Particulate Matter Standards. Upon Entry of  
26 this Consent Decree, Phelps Dodge shall comply with the standards prescribed in Sections I.A,  
27 I.B, and I.C of Appendix 3 of this Consent Decree with respect to all of the Facility's



1 molybdenum roasters. Compliance with these standards shall be determined by the terms and  
2 conditions of Appendix 3 of this Consent Decree, including, but not limited to, requirements for  
3 inspecting, monitoring, testing, recordkeeping, reporting, operating, and maintaining the  
4 molybdenum roasters and associated air pollution control equipment (except that CEMS shall not  
5 be used as a means of determining compliance until two hundred fifty (250) days after Entry of  
6 this Consent Decree). The requirements of this Paragraph 12.a do not modify the provisions of  
7 Attachment A, Section XII of the Existing Title V Permit.

8           b.     CEMS. Not later than two hundred fifty (250) days after Entry of this  
9 Consent Decree, Phelps Dodge shall install, calibrate, maintain, and operate CEMS that  
10 continuously measure sulfur dioxide emissions from all of the Facility's molybdenum roasters in  
11 accordance with the requirements of Appendix 3 of this Consent Decree. Any time needed for  
12 shakedown or training shall occur within this 250-day time period. Any time needed to conduct  
13 the initial CEMS performance test required by Appendix 3, Section V.C, which includes  
14 submitting all required notifications, shall occur within this 250-day time period.

15           c.     Maintenance Stack. Upon Entry of this Consent Decree, Phelps Dodge is  
16 prohibited from using the Facility's molybdenum roaster maintenance stack to vent roaster off-  
17 gas to the atmosphere. Not later than sixty (60) days after Entry of this Consent Decree, Phelps  
18 Dodge shall disconnect the ducting to the Facility's molybdenum roaster maintenance stack,  
19 thereby eliminating the possibility of routing roaster off-gas to the atmosphere through the  
20 maintenance stack.

21           13.    Compliance Certification for the NSPS Affected Facilities and the Molybdenum  
22 Roasting Operations. Not later than twenty (20) days after the completion of the requirements of  
23 Paragraph 12.b of this Consent Decree, Phelps Dodge shall provide written certification to both  
24 EPA and ADEQ, at the addresses listed in Section XI, that Phelps Dodge (i) has complied with  
25 the requirements of Paragraph 12 of this Consent Decree; (ii) is in compliance with the  
26 requirements of 40 C.F.R. Part 60, Subparts A and LL, with respect to the NSPS Affected  
27 Facilities; and (iii) with respect to all of the Facility's molybdenum roasters, is in compliance

1 with the standards prescribed in Sections I.A, I.B, and I.C of Appendix 3 of this Consent Decree,  
2 compliance with these standards being determined by the terms and conditions of Appendix 3 of  
3 this Consent Decree.

4 14. Permitting. Not later than two hundred (200) days after Entry of this Consent  
5 Decree, Phelps Dodge shall submit to both EPA and ADEQ, at the addresses listed in Section XI,  
6 the following applications:

7 a. An application for a PSD Permit for the Dual Primary Crusher, which  
8 shall include, among other things, the following requirements: (i) a BACT analysis for  
9 particulate matter for the Dual Primary Crusher, and (ii) the Air Impact Analysis.

10 b. One or more applications for permit revisions to the Existing Title V  
11 Permit that, taken together, include all of the terms and conditions of Appendix 5 of the Consent  
12 Decree. Such application shall be in accordance with the procedures of (i) Title V of the Act;  
13 (ii) ADEQ's operating permits program, as approved by EPA pursuant to 40 C.F.R. Part 70;  
14 (iii) A.R.S. Title 49, Chapter 3; and (iv) A.A.C. Title 18, Chapter 2; and shall include a request  
15 that its permit application be accelerated pursuant to and consistent with the requirements in  
16 A.A.C. R18-2-326(I), accompanied by the initial fee of \$15,000. ADEQ may request an  
17 additional advance payment fee based on the most recent estimated cost of an accelerated  
18 processing of an application. Phelps Dodge may submit more than one permit revision  
19 application provided that such applications, taken together, include all of the terms and  
20 conditions of Appendix 5 of this Consent Decree and are all submitted by the deadline referenced  
21 above in this Paragraph 14. Phelps Dodge agrees not to oppose in any forum the incorporation of  
22 any or all of the conditions in Appendix 5 into the Existing Title V Permit.

23 15. Dual Primary Crusher. Irrespective of any action taken by ADEQ in response to  
24 Phelps Dodge's application for a PSD Permit for the Dual Primary Crusher, Phelps Dodge shall  
25 perform an air quality impact analysis at least as stringent as the Air Impact Analysis, and submit  
26 the results of such analysis to both EPA and ADEQ, at the addresses listed in Section XI, prior to  
27 the termination of this Consent Decree.

16. Quarterly Status Reports. In accordance with A.A.C. R18-2-329(B), Phelps Dodge shall submit to ADEQ a quarterly report of the status of the source and construction progress. Phelps Dodge shall provide ADEQ with the original and EPA with a copy of each such quarterly report within thirty (30) days of the end of each calendar quarter and at the address listed in Section XI of this Consent Decree.

## VI. CIVIL PENALTIES

17. No later than thirty (30) days after Entry of this Consent Decree, Phelps Dodge shall pay civil penalties both to (i) the United States in the amount of ONE MILLION TWO HUNDRED SIXTY THOUSAND DOLLARS (\$1,260,000.00), and (ii) the State in the amount of ONE HUNDRED FORTY THOUSAND DOLLARS (\$140,000.00). Payments shall include interest at the statutory rate applicable to judgments, 28 U.S.C. § 1961, accruing as of thirty (30) days after the date of Lodging of the Consent Decree through the date of payment.

18. Payment to the United States under this Consent Decree shall be made by Electronic Funds Transfer (“EFT”) to the United States Department of Justice account according to current United States EFT procedures. Prior to making any payments, Phelps Dodge shall request current EFT procedures from the Financial Litigation Unit of the United States Attorney’s Office in the District of Arizona. The payment shall reference United States Department of Justice Case Number 90-5-2-1-06548 and U.S.A.O. File Number \_\_\_\_\_ and this Decree. Any payments received after 11:00 am (Eastern Time) will be credited on the next business day. Once the transfer is made, Phelps Dodge shall send notice of payment to the person designated as “Point of Contact” on the EFT instructions, and shall send notice of payment to both EPA and the United States Department of Justice at the addresses listed in Section XI. The notice of payment shall identify (i) the date and amount of money transferred; (ii) the name and address of the transferring bank; (iii) the civil action case name and case number; (iv) U.S.A.O. File Number \_\_\_\_\_; (v) United States Department of Justice Case Number 90-5-2-1-06548; and (vi) this Consent Decree (including Date of Entry).

19. Payment to the State under this Consent Decree shall be made in one of the two following ways: (i) by a single cashier's check made payable to "Arizona Department of Environmental Quality"; or (ii) by wire transfer to Arizona Department of Environmental Quality, Bank of America, Account No. 122101706-001-000-985. If payment is made by cashier's check, Phelps Dodge shall ensure that the cashier's check and a letter tendering the payment are received by Mr. Michael D. Clark, Chief Financial Officer, Arizona Department of Environmental Quality (Attention: Accounts Receivable), P.O. Box 618, Phoenix, Arizona 85001-0618, on or before the date payment is due. If payment is made by wire transfer, Phelps Dodge shall ensure that a letter confirming the date the transfer was made is received by Mr. Michael D. Clark at the above address, on or before the date payment is due. The letter tendering payment or the letter confirming the date of transfer, whichever is applicable, shall identify this civil action case name and case number. Phelps Dodge shall send copies of the letter confirming the date of wire transfer or both the check and letter tendering payment, whichever is applicable, to both ADEQ and the State's Attorney General at the addresses listed in Section XI.

20. The payment of the civil penalties specified in this Section shall not be deductible by Phelps Dodge or any other person or entity for federal, state, or local taxation purposes.

21. If the civil penalty is not timely paid, this Consent Decree shall be considered an enforceable judgment for purposes of post-judgment collection of any unpaid amounts and interest in accordance with Rule 69 of the Federal Rules of Civil Procedure and other applicable federal authority. Phelps Dodge shall be liable for all fees and costs incurred by Plaintiffs to collect any amounts due under this Consent Decree.

#### VII. FAILURE TO COMPLY WITH THE CONSENT DECREE

##### 22. Stipulated Penalties.

a. Subject to the force majeure provisions of Section VIII, Phelps Dodge shall be liable for stipulated penalties in the amounts set forth in this Paragraph 22 to the Plaintiffs for failure to comply with the terms and conditions of this Consent Decree as follows:

- (1) for Phelps Dodge's failure to pay the full amount of the civil

penalties set forth in Section VI: \$5,000 for each day that payment of the civil penalties is delayed beyond the date due;

(2) for Phelps Dodge's failure to comply with any of the procedures for paying the civil penalties set forth in Section VI: \$1,000 per day for each failure to comply;

(3) with regard to the requirements of Section V,

(a) for Phelps Dodge's failure to comply with the following requirements of Paragraph 11 of this Consent Decree applicable to the Eastern NSPS Affected Facilities:

VIOLATION	PENALTY PER OCCURRENCE	
FAILURE TO COMPLY WITH THE PARTICULATE MATTER STANDARD OF 40 C.F.R. § 60.382 [Decree, Paragraph 11.a]	\$1,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE	\$5,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE
FAILURE TO COMPLY WITH THE OPACITY STANDARD OF 40 C.F.R. § 60.382 [Decree, Paragraph 11.a]	\$1,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE REGARDLESS OF NUMBER OF OCCURRENCES PER DAY	\$5,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE REGARDLESS OF NUMBER OF OCCURRENCES PER DAY
FAILURE TO INSTALL, CALIBRATE, MAINTAIN, OR OPERATE CONTINUOUS MONITORING DEVICES ON THE WET SCRUBBERS AS REQUIRED BY 40 C.F.R. § 60.384 [Decree, Paragraph 11.b]	\$250 PER DAY FOR 3 <sup>RD</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE	\$500 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE
FAILURE TO RECORD MEASUREMENTS FROM THE CONTINUOUS MONITORING DEVICES AS REQUIRED BY 40 C.F.R. § 60.385 [Decree, Paragraph 11.b]	\$250 PER DAY FOR 4 <sup>TH</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE	\$500 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE
FAILURE TO SUBMIT SEMIANNUAL REPORTS REGARDING MEASUREMENTS FROM THE CONTINUOUS MONITORING DEVICES AS REQUIRED BY 40 C.F.R. § 60.385 [Decree, Paragraph 11.b]	\$250 PER DAY FOR 1 <sup>ST</sup> THROUGH 30 <sup>TH</sup> DAY OF NONCOMPLIANCE	\$500 PER DAY FOR EACH DAY AFTER 30 <sup>TH</sup> DAY OF NONCOMPLIANCE
FAILURE TO MAINTAIN AND OPERATE THE EASTERN NSPS AFFECTED FACILITIES AND ASSOCIATED WET SCRUBBERS IN A MANNER CONSISTENT WITH GOOD AIR POLLUTION CONTROL PRACTICE AS REQUIRED BY 40 C.F.R. § 60.11(d) [Decree, Paragraph 11]	\$250 PER DAY FOR 1 <sup>ST</sup> THROUGH 30 <sup>TH</sup> DAY OF NONCOMPLIANCE	\$500 PER DAY FOR EACH DAY AFTER 30 <sup>TH</sup> DAY OF NONCOMPLIANCE
FAILURE TO COMPLY WITH THE PROHIBITION AGAINST CIRCUMVENTION AS REQUIRED BY 40 C.F.R. § 60.12 [Decree, Paragraph 11]	\$250 PER DAY FOR 1 <sup>ST</sup> THROUGH 30 <sup>TH</sup> DAY OF NONCOMPLIANCE	\$500 PER DAY FOR EACH DAY AFTER 30 <sup>TH</sup> DAY OF NONCOMPLIANCE

(b) for Phelps Dodge's failure to comply with the following requirements of Paragraph 12 or Appendix 3 of this Consent Decree (for purposes of this Paragraph 22.a.(3).(b) only, "reporting period" shall mean the semi-annual reporting period referred to in the Existing Title V Permit, Attachment A, Section VII.A):

VIOLATION	PENALTY PER OCCURRENCE	
FAILURE TO COMPLY WITH THE OPACITY STANDARD FOR THE MOLYBDENUM ROASTING OPERATIONS [Decree, Paragraph 12.a; Appendix 3, Section I.B]	\$1,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 2 <sup>ND</sup> DAY OF NONCOMPLIANCE REGARDLESS OF NUMBER OF OCCURRENCES PER DAY	\$5,000 PER DAY FOR EACH DAY AFTER 2 <sup>ND</sup> DAY OF NONCOMPLIANCE REGARDLESS OF NUMBER OF OCCURRENCES PER DAY
FAILURE TO COMPLY WITH THE PARTICULATE MATTER OR REDUCED SULFUR STANDARDS FOR THE MOLYBDENUM ROASTING OPERATIONS [Decree, Paragraph 12.a; Appendix 3, Sections I.A, I.C]	\$5,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE	\$10,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE
BYPASSING MOLYBDENUM ROASTER POLLUTION CONTROL DEVICES, OR USE OF ROOF MODE OPERATION [Appendix 3, Section IV.C-D]	\$5,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE	\$10,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE
USE OF MAINTENANCE STACK TO VENT ROASTER OFF-GAS TO THE ATMOSPHERE [Decree, Paragraph 12.c; Appendix 3, Section IV.D]	\$5,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE	\$10,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE
FAILURE TO DISCONNECT DUCTING TO MAINTENANCE STACK [Decree, Paragraph 12.c; Appendix 3, Section IV.D]	\$1,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE	\$5,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE
FAILURE TO INSTALL, CALIBRATE, BEGIN OPERATION OF, AND CONDUCT COMPLETE INITIAL PERFORMANCE TEST OF CEMS WITHIN 250 DAYS AFTER ENTRY [Decree, Paragraph 12.b]	\$10,000 FOR FAILURE TO MEET 250-DAY DEADLINE	\$2,000 PER DAY FOR EACH DAY AFTER 30 <sup>TH</sup> DAY OF NONCOMPLIANCE
FAILURE TO COLLECT VALID ROASTER FEED SAMPLES [Appendix 3, Section II.A.1.a.(1)(a)]	\$50 PER SAMPLE FOR THE 13 <sup>TH</sup> THROUGH THE 36 <sup>TH</sup> MISSING VALID SAMPLE WITHIN EACH REPORTING PERIOD	\$250 PER SAMPLE FOR EACH MISSING VALID SAMPLE AFTER THE 37 <sup>TH</sup> MISSING VALID SAMPLE WITHIN EACH REPORTING PERIOD
FAILURE TO DETERMINE PERCENT SULFUR IN ROASTER FEED WHEN A VALID ROASTER FEED SAMPLE HAS BEEN TAKEN [Appendix 3, Section II.A.1.a.(1)(b)-(e)]	\$1,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD	\$5,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD

1 2 3	FAILURE TO DETERMINE PERCENT MOISTURE CONTENT IN ROASTER FEED WHEN A VALID ROASTER FEED SAMPLE HAS BEEN TAKEN [Appendix 3, Section II.A.1.a.(2)]	\$1,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD	\$5,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD
4 5 6 7	FAILURE TO COLLECT VALID MEASUREMENTS OF ROASTER FEED EITHER FROM FEED WEIGH BIN LOAD CELLS OR FROM MANUALLY CALIBRATING THE FEED SCREW SPEED IN ACCORDANCE WITH THE PROCEDURES IN APPENDIX 3, SECTION II.A.2 [Appendix 3, Sections II.A.1.a.(3)(a)-(b) and II.A.2]	\$1,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE REGARDLESS OF NUMBER OF OCCURRENCES PER DAY	\$5,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE REGARDLESS OF NUMBER OF OCCURRENCES PER DAY
8 9 10 11	FAILURE TO CORRECT HOURLY WET FEED VALUE TO A DRY FEED VALUE [Appendix 3, Section II.A.1.a.(3)(c) ]	\$1,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD REGARDLESS OF NUMBER OF OCCURRENCES PER DAY	\$5,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD REGARDLESS OF NUMBER OF OCCURRENCES PER DAY
12 13 14	FAILURE TO DETERMINE HOURLY SO <sub>2</sub> GENERATION [Appendix 3, Section II.A.1.a.(4)]	\$1,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD REGARDLESS OF NUMBER OF OCCURRENCES PER DAY	\$5,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD REGARDLESS OF NUMBER OF OCCURRENCES PER DAY
15 16 17	FAILURE TO COLLECT ALL REQUIRED VALID CEMS DATA POINTS DURING AN HOUR [Appendix 3, Section II.A.1.b.(1)-(2)]	\$50 PER HOUR FOR 25 <sup>TH</sup> THROUGH 72 <sup>ND</sup> HOUR OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD	\$500 PER HOUR FOR EACH HOUR AFTER 73 <sup>RD</sup> HOUR OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD
18 19 20	FAILURE TO DETERMINE HOURLY SO <sub>2</sub> MASS EMISSIONS [Appendix 3, Section II.A.1.b.(3)]	\$1,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD REGARDLESS OF NUMBER OF OCCURRENCES PER DAY	\$5,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD REGARDLESS OF NUMBER OF OCCURRENCES PER DAY
21 22 23	FAILURE TO COMPARE HOURLY SO <sub>2</sub> GENERATION DETERMINATION WITH CORRESPONDING HOURLY SO <sub>2</sub> MASS EMISSIONS DETERMINATION [Appendix 3, Section II.A.1]	\$1,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD REGARDLESS OF NUMBER OF OCCURRENCES PER DAY	\$5,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD REGARDLESS OF NUMBER OF OCCURRENCES PER DAY
24 25 26	FAILURE TO PERFORM COMPLETE DAILY INSPECTIONS OF ALL ROASTER FEED WEIGH BIN LOAD CELLS [Appendix 3, Section II.A.2]	\$500 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD	\$1,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD

1	FAILURE TO CONDUCT ANNUAL CALIBRATION (INCLUDING PERFORMING CORRECTIVE ACTION) OF THE ROASTER FEED WEIGH BIN LOAD CELLS [Appendix 3, Section II.A.2]	\$1,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD	\$5,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD
2			
3			
4	FAILURE TO CONTINUOUSLY RECORD pH OF SCRUBBER SLURRY UNDERFLOW DURING PERIOD OF MISSING CEMS DATA [Appendix 3, Section II.A.3]	\$500 PER DAY FOR 2 <sup>ND</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD REGARDLESS OF NUMBER OF OCCURRENCES PER DAY	\$1,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD REGARDLESS OF NUMBER OF OCCURRENCES PER DAY
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6			
7	FAILURE TO RECORD AND MAINTAIN REQUIRED RECORDS [Appendix 3, Section II.B]	\$500 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD	\$1,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD
8			
9			
10	FAILURE TO SUBMIT A COMPLETE AND ACCURATE CEMS EXCESS EMISSIONS AND MONITORING SYSTEM PERFORMANCE REPORT [Appendix 3, Section II.A.1 and C]	\$1,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITH SUBMITTAL DEADLINE	\$5,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITH SUBMITTAL DEADLINE
11		\$1,000 PER DAY FOR 31 <sup>ST</sup> THROUGH 60 <sup>TH</sup> DAY OF NONCOMPLIANCE WITH COMPLETENESS OR ACCURACY REQUIREMENT AFTER RECEIPT OF WRITTEN NOTICE OF DEFICIENCY OF THE ORIGINAL REPORT OR ANY SUPPLEMENT THERETO	\$5,000 PER DAY AFTER 60 <sup>TH</sup> DAY OF NONCOMPLIANCE WITH COMPLETENESS OR ACCURACY REQUIREMENT AFTER RECEIPT OF WRITTEN NOTICE OF DEFICIENCY OF THE ORIGINAL REPORT OR ANY SUPPLEMENT THERETO
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17	FAILURE TO MAINTAIN AND OPERATE MOLYBDENUM ROASTER OPERATIONS OR ASSOCIATED POLLUTION CONTROL DEVICES IN A MANNER CONSISTENT WITH GOOD AIR POLLUTION CONTROL PRACTICES [Appendix 3, Section IV.A-B]	\$250 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE	\$500 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE
18			
19			
20			
21	FAILURE TO PERFORM COMPLETE DAILY CHECKS OF CEMS, SO <sub>2</sub> ANALYZER, OR FLOW (INCLUDING PERFORMING ROUTINE MAINTENANCE, MANUAL CALIBRATIONS, OR ADJUSTMENTS; AND COMPLETING LOGS); OR TO PERFORM CORRECTIVE ACTION (INCLUDING POST-CORRECTIVE ACTION TESTING AND RE-CALIBRATIONS) [Appendix 3, Sections V.B, V.C.3.a, and V.C.5]	\$500 PER DAY PER VIOLATION FOR 2 <sup>ND</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD	\$1,000 PER DAY PER VIOLATION FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE WITHIN EACH REPORTING PERIOD
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23			
24			
25			
26	FAILURE TO CONDUCT COMPLETE CEMS RATA (INCLUDING SUBMITTING NOTIFICATIONS) [Appendix 3, Section V.C.1]	\$500 PER DAY FOR 30 <sup>TH</sup> THROUGH 60 <sup>TH</sup> DAY OF NONCOMPLIANCE	\$2,000 PER DAY FOR EACH DAY AFTER 60 <sup>TH</sup> DAY OF NONCOMPLIANCE
27			



FAILURE TO CONDUCT COMPLETE CGA OR RAA [Appendix 3, Section V.C.3.b]	\$1,000 PER DAY FOR 7 <sup>th</sup> THROUGH 14 <sup>th</sup> DAY OF NONCOMPLIANCE	\$2,000 PER DAY FOR EACH DAY AFTER 14 <sup>th</sup> DAY OF NONCOMPLIANCE
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(c) for Phelps Dodge's failure to comply with the following requirements of Paragraphs 13, 14, and 16 of this Consent Decrees:

VIOLATION	PENALTY PER OCCURRENCE	
FAILURE TO SUBMIT COMPLIANCE CERTIFICATION [Decree, Paragraph 13]	\$1,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE	\$5,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE
FAILURE TO SUBMIT PERMIT APPLICATIONS [Decree, Paragraph 14]	\$1,000 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE	\$5,000 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE
FAILURE TO SUBMIT QUARTERLY STATUS REPORTS [Decree, Paragraph 16]	\$500 PER DAY FOR 1 <sup>ST</sup> THROUGH 7 <sup>TH</sup> DAY OF NONCOMPLIANCE	\$2,500 PER DAY FOR EACH DAY AFTER 7 <sup>TH</sup> DAY OF NONCOMPLIANCE

(4) for Phelps Dodge's failure to comply with any requirement of Section X: \$10,000 per day for each failure to comply; and

(5) for Phelps Dodge's failure to comply with any requirement of this Section VII or any other requirement of this Consent Decree not specifically referenced in this Paragraph 22.a (1) through (4) above, other than the requirements of Section V or Appendix 3 of this Consent Decree: \$1,000 per day for each failure to comply.

b. All stipulated penalties shall automatically begin to accrue on the day after the complete performance is due or the first day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate stipulated penalties for separate violations of this Consent Decree. Stipulated penalties shall accrue regardless of whether Plaintiffs have notified Phelps Dodge of a violation of the Consent Decree.

c. Any stipulated penalty accruing pursuant to this Consent Decree shall be due and payable within thirty (30) calendar days after receipt of either Plaintiff's written demand for the payment of a stipulated penalty or interest, unless disputed by Phelps Dodge in which case

the procedures of Paragraph 37 of this Consent Decree shall apply.

23. Stipulated penalties shall be divided as follows:

PARAGRAPH OR SECTION VIOLATED	UNITED STATES SHARE	STATE SHARE
11.a,b; 12.b,c; 14.a,b; 15; 17(i); 18	100%	0%
12.a; 13; 16; X	50%	50%
17(ii); 19	0%	100%
ANY OTHER REQUIREMENT OF THIS DECREE NOT SPECIFICALLY REFERENCED IN THIS TABLE	50%	50%

Stipulated penalties shall be paid in the same manner as set forth in Paragraphs 18 and 19 except that the notice of payment shall also identify (i) the specific provision of this Section VII related to such payment, and (ii) a description of the violation(s) of this Consent Decree for which the stipulated penalties or interest are being tendered.

24. Interest. If Phelps Dodge fails to pay the full amount of the civil penalties specified in Section VI when due or the full amount of any stipulated penalty specified in this Section VII when it is due, then Phelps Dodge shall pay to the Plaintiffs (in addition to the unpaid balance of each penalty) interest on the unpaid balance of each penalty. Interest shall accrue on the unpaid balance of the civil penalties or of any stipulated penalty at the rate established pursuant to 28 U.S.C. § 1961. Interest shall be calculated from the date payment is due under this Consent Decree through the date of actual payment.

25. The payment of any stipulated penalty or interest specified in this Section shall not be deductible by Phelps Dodge or any other person or entity for federal, state, or local taxation purposes.

26. Payment of stipulated penalties for a violation of this Consent Decree shall be in addition to the right of the United States or the State to seek other judicial or administrative relief for the violations that led to stipulated penalties. In addition, the United States and the State reserve their rights to pursue any or all relief for any or all violations outside the purview of this

1 Consent Decree.

2 VIII. FORCE MAJEURE

3 27. Phelps Dodge shall perform all of its obligations under this Consent Decree,  
4 including, but not limited to, the requirements of Section V, except to the extent and for the  
5 period of time that such performance is prevented or delayed by an event that constitutes a force  
6 majeure.

7 28. For purposes of this Consent Decree, a "force majeure" is defined as an event  
8 arising from causes beyond the control of Phelps Dodge (including its agents, contractors,  
9 consultants, or any other entity within the control of Phelps Dodge) that prevents or delays the  
10 performance of any obligation under this Consent Decree despite Phelps Dodge's best efforts to  
11 fulfill the obligation. The requirement that Phelps Dodge exercise "best efforts to fulfill the  
12 obligation" includes using best efforts to anticipate any reasonably foreseeable potential force  
13 majeure event and best efforts to address the effects of any potential force majeure event to the  
14 extent practicable (i) as it is occurring and (ii) following the potential force majeure event, such  
15 that delay is avoided or minimized to the greatest extent practicable. "Force majeure" does not  
16 include extreme weather conditions that are typical of the area in which the Facility is located,  
17 economic hardship, increased costs or expenses associated with Phelps Dodge's performance of  
18 its obligations under this Consent Decree, or failure of ADEQ or any other government agency to  
19 issue a required permit, conduct any required review, or grant any required approval.

20 29. In the event of a force majeure, the time for performance of the activity delayed by  
21 the force majeure shall be extended for the time period of the delay attributable to the force  
22 majeure. The time for performance of any activity dependent on the delayed activity shall be  
23 similarly extended, except to the extent that the dependent activity can be implemented in a  
24 shorter time. EPA (and, with regard to compliance with the requirements of Paragraphs 17(ii)  
25 and 19 only, ADEQ) shall determine whether the dependent activities will be delayed by the  
26 force majeure and whether the time period should be extended for performance of such activities.  
27 Phelps Dodge shall adopt all reasonable measures to avoid or minimize any delay caused by a

1 force majeure.

2 30. When an event occurs or has occurred that may delay or prevent the performance  
3 of any obligation under this Consent Decree, Phelps Dodge shall notify by telephone, at (415)  
4 972-3988, the Chief of the Air Enforcement Office, Air Division of EPA Region IX, and, at  
5 (602) 771-2301, the Compliance Section Manager, Air Quality Division of ADEQ, within 72  
6 hours of Phelps Dodge's knowledge of such event. Telephone notification shall be followed by  
7 written notification to EPA and ADEQ, at the addresses in Section XI of this Consent Decree,  
8 made within seven (7) days of Phelps Dodge's knowledge of the event. The written notification  
9 shall fully describe (i) the event that may delay or prevent performance; (ii) the reason that such  
10 event may delay or prevent performance; (iii) whether Phelps Dodge claims that such event  
11 constitutes a force majeure under this Consent Decree; (iv) the reasons any such delay is beyond  
12 the control of Phelps Dodge; (v) the anticipated duration of the delay; (vi) all actions taken or to  
13 be taken to prevent or minimize the delay; (vii) a schedule for implementation of any measures to  
14 be taken to prevent or minimize the delay or the effect of the delay; and (viii) the time needed to  
15 implement any dependent activities. For purposes of this Section, Phelps Dodge will be deemed  
16 to have known of any circumstances that any of Phelps Dodge's agents, contractors, consultants,  
17 or any other entity within the control of Phelps Dodge, knew or should have known.

18 31. Phelps Dodge's failure to comply with force majeure notice requirements  
19 provided in Paragraph 30 above for any delay in performance will be deemed an automatic  
20 forfeiture of its right to assert that the delay was caused by a force majeure.

21 32. After receiving notice from Phelps Dodge of an event that Phelps Dodge believes  
22 constitutes a force majeure, EPA (and, with regard to compliance with the requirements of  
23 Paragraphs 17(ii) and 19 only, ADEQ) shall provide written notification to Phelps Dodge stating  
24 whether EPA (and, with regard to compliance with the requirements of Paragraphs 17(ii) and 19  
25 only, ADEQ) agree(s) that there was a force majeure event and whether Phelps Dodge's request  
26 for a delay is justified. If EPA (and, with regard to compliance with the requirements of  
27 Paragraphs 17(ii) and 19 only, ADEQ) agree(s) that a delay or failure to perform an obligation of

1 this Consent Decree has been or will be caused by force majeure, EPA (and, with regard to  
2 compliance with the requirements of Paragraphs 17(ii) and 19 only, ADEQ) may agree to an  
3 extension or modification of the particular compliance requirement affected by the delay for a  
4 period not exceeding the delay actually caused by such circumstances. Phelps Dodge shall not be  
5 liable for stipulated penalties for the period agreed to by EPA (and, with regard to compliance  
6 with the requirements of Paragraphs 17(ii) and 19 only, ADEQ) pursuant to the preceding  
7 sentence. EPA's (and, with regard to compliance with the requirements of Paragraphs 17(ii) and  
8 19 only, ADEQ's) failure to respond to Phelps Dodge's request within thirty (30) days of receipt  
9 of the request will be deemed a denial of that request. If Phelps Dodge disagrees with EPA's  
10 (and, with regard to compliance with the requirements of Paragraphs 17(ii) and 19 only,  
11 ADEQ's) force majeure determination, then Phelps Dodge may initiate the dispute resolution  
12 procedures of Section IX.

#### 13 IX. DISPUTE RESOLUTION

14 33. The dispute resolution procedure of this Section shall be the exclusive mechanism  
15 to resolve any disputes arising under this Decree.

16 34. Any dispute arising under or with respect to this Consent Decree shall in the first  
17 instance be the subject of informal negotiations between the Parties. The period of informal  
18 negotiations shall not extend beyond thirty (30) days from the time the dispute arises, unless the  
19 Parties otherwise agree in writing. The dispute shall be considered to have arisen when one Party  
20 sends the other a written Notice of Dispute.

21 35. If the informal negotiations are unsuccessful, then the position advanced by EPA  
22 (and, with regard to compliance with the requirements of Paragraphs 17(ii) and 19 only, ADEQ)  
23 shall control, unless Phelps Dodge files a motion with this Court for dispute resolution. Any  
24 such motion must be filed within thirty (30) days after Phelps Dodge's receipt of EPA's (and,  
25 with regard to compliance with the requirements of Paragraphs 17(ii) and 19 only, ADEQ's) final  
26 written position concerning the dispute and such motion must be served concurrently on EPA,  
27 the United States Department of Justice, ADEQ, and the State's Attorney General. The motion

1 shall set forth the nature of the dispute, shall provide documents in support of Phelps Dodge's  
2 position, and provide a proposal for resolution of the dispute. The United States (and, with  
3 regard to compliance with the requirements of Paragraphs 17(ii) and 19 only, the State) shall then  
4 have thirty (30) days to respond to Phelps Dodge's motion. In any such dispute resolution  
5 proceeding, Phelps Dodge bears the burden of proving, by a preponderance of the evidence,  
6 (i) that Phelps Dodge did not violate the terms and conditions of this Consent Decree; (ii) in  
7 disputes regarding Section VIII, that the event constitutes a force majeure, best efforts were  
8 exercised to fulfill the obligation and to avoid or minimize delay to the greatest extent  
9 practicable, the duration of the delay or the extension sought was or will be warranted under the  
10 circumstances, and Phelps Dodge complied with the force majeure notification requirements; or  
11 (iii) in disputes regarding the termination of this Consent Decree, that all conditions for  
12 termination have been satisfied.

13 36. Unless the United States (and, with regard to compliance with the requirements of  
14 Paragraphs 17(ii) and 19 only, the State) or this Court agrees otherwise, Phelps Dodge's  
15 invocation of dispute resolution procedures under this Section shall not extend, postpone, or  
16 affect in any way any obligation of Phelps Dodge under this Consent Decree.

17 37. Phelps Dodge's timely filing of a motion with this Court for dispute resolution  
18 pursuant to Paragraph 35 above shall not toll the accrual of stipulated penalties or interest under  
19 this Consent Decree. However, payment of stipulated penalties with respect to the disputed  
20 matter shall be stayed pending resolution of the dispute. No penalties shall be due for matters  
21 upon which Phelps Dodge prevails in a dispute resolved pursuant to Paragraph 35 above. In any  
22 dispute in which the United States (and, with regard to compliance with the requirements of  
23 Paragraphs 17(ii) and 19 only, the State) prevail(s), accrued stipulated penalties shall be due  
24 within fifteen (15) days after the Court issues an order resolving the dispute.

#### 25 X. RIGHT OF ENTRY

26 38. Any authorized representative of the United States or the State, including EPA or  
27 ADEQ authorized contractors, consultants, or agents, upon presentation of credentials, shall have

1 the right to enter and inspect the Facility to ensure Phelps Dodge's compliance with the  
2 provisions of this Consent Decree and the requirements of the Act and the regulations  
3 promulgated thereunder. This provision of the Consent Decree is in addition to, and in no way  
4 limits or otherwise affects EPA's or ADEQ's access, entry, inspection, monitoring, or  
5 information gathering authorities and rights, including enforcement authorities related thereto,  
6 under the Act or under any other federal, state, or local laws, statutes, regulations, rules,  
7 ordinances, or permits.

#### 8 XI. FORM OF NOTICE

9 39. Except as otherwise specifically stated, when written notification to or  
10 communication with the United States Department of Justice, EPA, the State's Attorney General,  
11 ADEQ, or Phelps Dodge is required by the terms of this Consent Decree, it shall be addressed as  
12 follows:

13 As to the United States Department of Justice:

14 if by regular mail or post office express mail, then to the

15 Chief, Environmental Enforcement Section  
16 Environment and Natural Resources Division  
17 United States Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611

18 if by private overnight mail service, then to the

19 Chief, Environmental Enforcement Section  
20 Environment and Natural Resources Division  
21 United States Department of Justice  
1425 New York Avenue, 13th Floor  
Washington, DC 20005

22 As to EPA:

23 Thomas P. Mintz  
24 Office of Regional Counsel (ORC-2-1)  
25 U.S. Environmental Protection Agency, Region IX  
75 Hawthorne Street  
San Francisco, California 94105

26 As to the State's Attorney General:

27 Attorney General of the State of Arizona

Office of the Attorney General  
1275 West Washington Street  
Phoenix, Arizona 85007  
Attn: Sonia D. Overholser, Asst. Atty. General

As to ADEQ:

Manager of Air Quality Compliance Section  
Arizona Department of Environmental Quality  
1110 West Washington Street  
Phoenix, Arizona 85007

As to Phelps Dodge:

S. David Colton, Senior Vice President and General Counsel  
Phelps Dodge Sierrita, Inc.  
One North Central Avenue  
Phoenix, Arizona 85004

40. All notices, reports, and submissions that Phelps Dodge is required to submit pursuant to this Consent Decree shall (i) be sent by express mail or similar overnight mail delivery service with return receipt requested; (ii) refer to this Consent Decree (including Date of Entry), the civil action case name and case number, and the United States Department of Justice Case Number 90-5-2-1-06548; and (iii) shall be signed and affirmed by a responsible official of Phelps Dodge (i.e., a president, secretary, treasurer, or vice-president of Phelps Dodge; a senior management representative at the Facility; or any person who performs similar policy or decision-making functions for Phelps Dodge) using the following certification statement:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I certify that the information is true, accurate, and complete to the best of my knowledge, information, and belief. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

XII. REPORTING AND RECORDKEEPING

41. All information and documents that Phelps Dodge submits to EPA or to ADEQ pursuant to this Consent Decree shall be available to the public unless identified and deemed confidential by Phelps Dodge in conformance with (i) the Act and 40 C.F.R. Part 2 with respect to information and documents submitted to EPA, and (ii) A.R.S. § 49-432 and A.A.C. R18-2-305



1 with respect to information and documents submitted to ADEQ. The information or documents  
2 so identified as confidential will be disclosed only in accordance with (i) the Act and 40 C.F.R.  
3 Part 2 with respect to information and documents submitted to EPA, and (ii) A.R.S. § 49-432 and  
4 A.A.C. R18-2-305 with respect to information and documents submitted to ADEQ.

5 42. Phelps Dodge shall maintain at the Facility copies of all notices, reports,  
6 submissions, and records (including computer stored information) that relate to its performance  
7 of its obligations under this Consent Decree until the termination of this Consent Decree or as  
8 required by applicable law, whichever is later. Phelps Dodge shall make copies of all notices,  
9 reports, submissions, and records required by this Consent Decree available to EPA and ADEQ  
10 upon request.

11 43. Within fifteen (15) days after Phelps Dodge acquires knowledge that it has  
12 violated any requirement of this Decree or failed to meet any deadline established by this Decree,  
13 Appendix, or document incorporated by reference, Phelps Dodge shall notify Plaintiffs in writing  
14 of such failure and the reason for such failure and submit a plan for preventing such failure in the  
15 future.

### 16 XIII. COSTS OF SUIT

17 44. Each Party shall bear its own costs and attorneys' fees incurred in this action.

18 45. Should this Court subsequently determine that Phelps Dodge violated the terms or  
19 conditions of this Consent Decree, then Phelps Dodge shall be liable to the United States for any  
20 costs and attorneys' fees that the United States incurs and to the State for any costs and attorneys'  
21 fees that the State incurs in any action or proceeding to enforce this Consent Decree, including,  
22 but not limited to, a proceeding to collect any unpaid balance of the civil penalties specified in  
23 Section VI or any unpaid balance of a stipulated penalty or interest to be paid in accordance with  
24 Section VII.

### 25 XIV. EFFECT OF THE CONSENT DECREE

26 46. Entry of this Consent Decree and compliance with the requirements herein shall  
27 be in full settlement and satisfaction of (i) the civil judicial claims of the United States against

1 Phelps Dodge only as specifically alleged in the Complaint filed in this action, and (ii) the civil  
2 judicial claims of the State against Phelps Dodge only as specifically alleged in the Complaint  
3 filed in this action.

4 47. Nothing in this Consent Decree is intended to nor shall be construed to operate in  
5 any way to resolve (i) any civil liability for violations of any provision of any federal, state, or  
6 local law, statute, regulation, rule, ordinance, or permit not specifically alleged in the Complaint  
7 filed in this action; or (ii) any criminal liability.

8 48. This Consent Decree does not exempt, relieve, modify, or affect in any way  
9 Phelps Dodge's duty to comply with any and all applicable federal, state, and local laws, statutes,  
10 regulations, rules, ordinances, and permits; including, but not limited to, the Act, the regulations  
11 promulgated thereunder, and all applicable permits issued thereunder. Compliance with this  
12 Decree shall not be a defense to any actions commenced pursuant to such laws or regulations.

13 49. This Consent Decree is not, and shall not be construed to be, a permit or a  
14 modification of any existing permit issued pursuant to any federal, state, or local law, statute,  
15 regulation, rule, or ordinance; nor shall this Consent Decree in any way relieve Phelps Dodge of  
16 any obligation it may have to obtain a permit or to comply with an existing permit. Any permit  
17 or permit provision that purports to relieve Phelps Dodge from any obligation of this Consent  
18 Decree shall be ineffective for purposes of this Consent Decree and shall not relieve Phelps  
19 Dodge from performing any obligation of this Consent Decree.

20 50. The United States and the State do not, by their consent to the entry of this  
21 Consent Decree, warrant or aver in any manner that Phelps Dodge's compliance with this  
22 Consent Decree will result in compliance with the provisions of the Act, the regulations  
23 promulgated thereunder, or any applicable permits issued thereunder. Further, notwithstanding  
24 the Plaintiffs' receipt, review, approval, or failure to approve of any plans, reports, studies,  
25 policies, or procedures formulated pursuant to this Consent Decree, Phelps Dodge shall remain  
26 solely responsible for any noncompliance with the terms or conditions of this Consent Decree or  
27 with any federal, state, or local laws, statutes, regulations, rules, ordinances, or permits, and shall

1 not raise as a defense to any proceeding brought by the United States or the State to enforce this  
2 Consent Decree any act or omission of the United States or the State.

3 51. In addition to any other authority, right, or remedy available to the United States  
4 or the State under this Decree, the United States and the State specifically reserve any and all  
5 authorities, rights, and remedies available to them to address (i) any violation of this Consent  
6 Decree or any violation that the United States or State did not specifically allege in the Complaint  
7 filed in this action, or (ii) any situation or condition that may present an imminent and substantial  
8 endangerment to the environment or to the public health or welfare.

9 XV. EFFECTIVE DATE, MODIFICATION, AND TERMINATION

10 52. This Consent Decree shall take effect on the Date of Entry by this Court.

11 53. This Consent Decree contains the entire agreement between the Parties, and no  
12 statement, promise, or inducement made by any of the Parties or agent of the Parties that is not  
13 contained in this Consent Decree shall be valid or binding. Except to change the identity or  
14 address of persons receiving notification in accordance with Section XI, there shall be no  
15 modification of this Consent Decree without written approval of each and every Party to this  
16 Consent Decree and the Court.

17 54. This Consent Decree shall terminate when all of the following conditions have  
18 been met:

19 a. Phelps Dodge has complied with all of the requirements set forth in  
20 Section V of this Consent Decree;

21 b. Phelps Dodge has paid the civil penalties and interest as set forth in  
22 Section VI; all stipulated penalties and interest as set forth in Section VII; the enforcement  
23 expenses, costs, and attorneys' fees of the United States and State as set forth in Section XIII; and  
24 no penalties or other monetary obligations due under this Consent Decree are outstanding or  
25 owed to the United States or the State;

26 c. Phelps Dodge has received a Final Revised Permit (i) for which Phelps  
27 Dodge submitted an application in accordance with Paragraph 14 of this Consent Decree; and

1 (ii) that includes, but is not limited to, federally-enforceable terms and conditions that are at least  
2 as stringent as all of the terms and conditions included in Appendix 5 of this Consent Decree ;

3 d. all disputes arising under the Consent Decree have been resolved; and

4 e. this Court approves termination of this Consent Decree.

5 55. Phelps Dodge shall initiate termination of this Consent Decree by submitting a  
6 written certification ("Certification of Termination") concurrently to EPA, the United States  
7 Department of Justice, ADEQ, and the State's Attorney General at the addresses listed in Section  
8 XI, (i) that all conditions for termination pursuant to Paragraph 54 above (except for the  
9 condition in 54.e referring to this Court's approval of termination) have been satisfied; and  
10 (ii) that Phelps Dodge believes that the Consent Decree should be terminated.

11 a. After receiving the written Certification of Termination from Phelps  
12 Dodge, the State will provide Phelps Dodge, EPA, and the United States Department of Justice  
13 with a written response either (i) stating that Phelps Dodge has complied with all of the  
14 requirements of Paragraphs 17(ii) and 19, and no penalties, interest, enforcement expenses, costs,  
15 attorneys' fees, or other monetary obligation due under this Consent Decree are owed to the State  
16 ("Notice of Concurrence"); or (ii) stating that Phelps Dodge has not complied with all of the  
17 requirements of Paragraphs 17(ii) and 19, or penalties, interest, enforcement expenses, costs,  
18 attorneys' fees, or other monetary obligation due under this Consent Decree are owed to the State  
19 ("Notice of Nonconcurrence"). If the State fails to provide either a written Notice of  
20 Concurrence or a written Notice of Nonconcurrence within thirty (30) days after receiving the  
21 written Certification of Termination from Phelps Dodge, or if the State provides Phelps Dodge  
22 with a written Notice of Nonconcurrence, Phelps Dodge may initiate dispute resolution  
23 procedures pursuant to Section IX.

24 b. After receiving both the written Certification of Termination from Phelps  
25 Dodge and the written Notice of Concurrence from the State, the United States will provide  
26 Phelps Dodge with a written response, either stating that the United States agrees that the  
27 Consent Decree should be terminated, and submitting a motion to this Court requesting that the

1 Consent Decree be terminated, or stating that the United States has determined that the Consent  
2 Decree should not be terminated. After receiving both the written Certification of Termination  
3 from Phelps Dodge and the written Notice of Concurrence from the State, if the United States  
4 fails to provide a written response within thirty (30) days after receiving the written Notice of  
5 Concurrence from the State or if the United States determines that the Consent Decree should not  
6 be terminated, Phelps Dodge may initiate dispute resolution procedures pursuant to Section IX.

#### 7 XVI. RETENTION OF JURISDICTION

8 56. Until the termination of this Consent Decree pursuant to Section XV, this Court  
9 shall retain jurisdiction over this action and all disputes arising hereunder (to the extent that this  
10 Consent Decree provides for resolution of disputes by this Court) for the purposes of  
11 implementing and enforcing the terms and conditions of this Consent Decree.

#### 12 XVII. PUBLIC NOTICE

13 57. The Parties acknowledge that the final approval of the United States, as well as  
14 the Entry by this Court, of this Consent Decree is subject to the requirements of 28 C.F.R. § 50.7,  
15 which provides for notice in the Federal Register of the Lodging of this Consent Decree, an  
16 opportunity for public comment, and consideration of any comments. The United States reserves  
17 the right to withdraw or withhold its consent to this Consent Decree if the public comments  
18 disclose facts or considerations indicating that this Consent Decree is inappropriate, improper, or  
19 inadequate.

#### 20 XVIII. ENTRY AND SERVICE

21 58. Phelps Dodge consents to the Entry of this Consent Decree without further notice.  
22 Phelps Dodge further agrees not to oppose this Court's Entry of this Consent Decree or to  
23 challenge any provision of this Consent Decree.

24 59. If for any reason the Court should decline to approve this Consent Decree in the  
25 form presented, this agreement is voidable at the discretion of any Party.

26 60. Phelps Dodge shall identify on the attached signature page, the name, address and  
27 telephone number of an agent who is authorized to accept service of process by mail on behalf of

1 Phelps Dodge with respect to all matters arising under or relating to this Consent Decree.

2           61.     Phelps Dodge hereby agrees to accept service of process by mail and to waive the  
3 formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and in any  
4 applicable local rules of this Court, including, but not limited to, service of a summons.

5           62.     Upon approval and Entry of this Decree by the Court, this Decree shall constitute  
6 a final judgment pursuant to Rules 54 and 58 of the Federal Rules of Civil Procedure.  
7

8 IT IS SO ORDERED:  
9

10 \_\_\_\_\_  
11 DATE

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UNITED STATES DISTRICT JUDGE

1 FOR PLAINTIFF UNITED STATES OF AMERICA:

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4 5/4/04  
DATE

THOMAS L. SANSONETTI  
Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice

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DATE

LORI JONAS  
Senior Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice

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PAUL K. CHARLTON  
United States Attorney  
District of Arizona  
RICHARD GORDON  
Assistant United States Attorney  
Office of the United States Attorney  
District of Arizona

1 FOR PLAINTIFF UNITED STATES OF AMERICA (continued):

2  
3  
4 DATE

THOMAS V. SKINNER  
Acting Assistant Administrator for Enforcement  
and Compliance Assurance  
United States Environmental Protection Agency

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28 CONSENT DECREE



1 FOR PLAINTIFF UNITED STATES OF AMERICA (continued):

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4 DATE

WAYNE NASTRI  
Regional Administrator  
United States Environmental Protection Agency, Region IX

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12 OF COUNSEL:

13 THOMAS P. MINTZ  
Assistant Regional Counsel  
14 Office of Regional Counsel  
United States Environmental  
15 Protection Agency, Region IX  
75 Hawthorne Street  
16 San Francisco, California 94105

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28 CONSENT DECREE

1 FOR PLAINTIFF STATE OF ARIZONA:

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4 \_\_\_\_\_  
DATE

by: \_\_\_\_\_  
NANCY C. WRONA  
Director of Air Quality Division  
Arizona Department of Environmental Quality

1 FOR DEFENDANT PHELPS DODGE SIERRITA, INC.:  
2  
3

4 4-13-41

5 DATE

JOHN D. BRACK  
President and Unit General Manager  
Phelps Dodge Sierrita, Inc.  
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8 4-14-04

9 DATE

NEWMAN R. PORTER  
Lewis and Roca LLP  
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17 AGENT FOR SERVICE OF PROCESS:

18 NAME: C.T Corporation Systems

19  
20 TITLE: Registered Agent

21 ADDRESS: 3225 North Central Avenue

22  
23 Phoenix, Arizona 85012

24 TELEPHONE: \_\_\_\_\_  
25  
26  
27

28 CONSENT DECREE